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BOOK REVIEWS.

THE FEDERAL POWER OVER CARRIERS AND CORPORATIONS. By E. PARMALEE PRENTICE. New York: The Macmillan Company. 1907. pp. xi, 244.

Any one, whether lawyer or layman, who is interested in those questions of constitutional law which enter so largely into the public discussion of the day will find this work worth careful reading. It is not, however, a "first book" on the commerce clause, and for full comprehension requires some familiarity with constitutional law and decisions. For those who have this knowledge the book has noteworthy features.

First of these, and most important, is the fact that the book treats the Constitution as a historical instrument to be understood only by serious study of its origin and meaning, of the frame of government which it established and of its application in varying conditions. In this respect the book may almost be said to stand alone. Many treatises may be found which deal with legal decisions. This book shows an intimate acquaintance with the course of State legislation, year by year since the institution of this government, the debates of Congress and the legal and economic conditions with reference to which the decisions of the courts and the legislation of States and of Congress should be interpreted.

By this course of painstaking study conclusions have been reached which are stated in this book and which bear the stamp of that authority which long acceptance and continued practice alone can give. In some respects the results thus reached merely emphasize the general opinions; in other respects they are novel and raise doubts of the accuracy of ideas commonly held with respect to the power of the Federal government over interstate commerce.

What is the extent of Federal power over commerce? To this question, if the words of the Constitution alone be considered, no definite answer is possible. Congress can regulate commerce, and this may mean much or little,—looking to the words alone.

The purpose of the present book is to ascertain the meaning of this phrase by reference to the purposes of the Constitution and the history of the exercise of the Federal power. In so doing it is shown that two important conceptions underlay the clause and were firmly held by its framers and earliest interpreters. The first was that the power, to the extent to which it was granted, should be of a centralizing character; the second that a distinction must be made between Federal powers over foreign and Indian commerce on the one hand and the power on the other hand to regulate commerce among the States. The latter power has been sharply defined in constitutional history as a power whose essential character and primary function was to keep the ways of transportation open and to keep commerce among the States free. Any enlargement of the power beyond this is historically indefensible. So

much the book abundantly proves. Nor would such enlargement if instituted be of slight moment. "It is good" Lord Bacon said in his essay on "Innovations," "not to try experiments in States." Under the Constitution the powers of the States are adequate to enable them effectively to deal with present questions,—a position which finds support in the important decision of the Supreme Court of Illinois in the case of *Dunbar v. Telegraph Company*, 79 *Northeastern Reporter* p. 423, published in January, since this book was written. To disregard the States would not only conflict with the constitutional doctrines of State rights,—or in modern phrase, would be inconsistent with necessary powers of local self-government—but as is often the case when law is publicly disregarded it weakens the organized structure of society and endangers the liberty of citizens.

The powers of the States over commerce are therefore the subject of much attention in this book. It is shown, among other things, that grants of monopolies of ferries, bridges, canals, stage routes and even railroads have been considered proper exercises of State powers, and these monopolies which the States might grant they could also forbid, whether their operation were confined to the State or crossed State lines. The nature of these exclusive grants is discussed in the second chapter reviewing the famous case of *Gibbons v. Ogden*. In this chapter the limits of the decision and its proper interpretation are determined. It is shown, too, what the word "commerce" meant to Marshall. If at the present time the word has a larger significance that surely is no reason for giving to Marshall's expressions the larger, and to him unknown, meaning. Only in their contemporary significance can the dicta of the decision be reconciled with contemporary conditions, with established doctrines then generally held and with valid exercises by the States of power over commerce, both before and after this case. It is very important to show this as clearly as is done in the present work, for Marshall's general phrases have been, and will be, taken to give to doctrines of expanding Federal power a support which, when properly understood, they do not warrant.

The beginning of the Federal power being thus determined and the power itself defined, the author traces its development in subsequent chapters, so as to include interstate transportation and the regulation of rates. The history of this inclusion is a curious one, and raises many serious questions which the author states.

The next chapter discusses the question on Federal Incorporation and of Federal License of corporations doing an interstate business. It is easily shown that there is no constitutional warrant in history or decision for the assertion of Federal authority in either of these directions; that legislation of this character would be an invasion of unquestioned rights of the States,—rights which are essential for the maintenance of efficient State government and for the safety of the liberties of the citizen.

The chapter on the Sherman Anti-Trust Act gives what is perhaps the best extant statement of the line between Federal and State authority over commerce (168 et. seq.) and to this statement particular attention is called. Following this the author shows the relations which the act bears to powers of the National and State governments, and how its

operation was intended to be confined to a jurisdiction whose limits were fixed by the Constitution and defined by numerous decisions. Finally, it is shown, how in practice these limits have been over-stepped under a tendency to greater and greater departure from constitutional standards. This leads toward the creation of new Federal powers at the expense of the States,—powers, as the writer says, which are unlimited only because not granted,—toward the establishment of a Congressional despotism, destructive of those liberties of the citizen which have been so far the foundation stones of public contentment and prosperity.

The book is a thoughtful review of constitutional history bearing upon present problems, such as has nowhere else been given, and deserves wide attention.

THE FOUNDATIONS OF LEGAL LIABILITY. A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW.

Vol. I. Theory and Principles of Tort. BY THOMAS ATKINS STREET. Northport: Edward Thompson Co. 1906. pp. xxix, 500.

The preface to this sumptuously papered and printed volume leads the reader to expect a rare treat in the perusal of its contents. He is informed that the book "contains a new synthesis of the fundamental principles of tort along scientific and historical lines;" that the author "has turned up many new ideas, and has been able to present the old truths in new and more enlightening aspects;" that some of the author's discoveries "represent a considerable advance in legal knowledge," enabling him "to assign the conception of negligence to its proper place in legal theory." The reader is informed that "this subject of negligence has been much stirred;" and that the treatment of the subject of conversion, while apparently rather novel, proceeds "upon right lines." He is assured, also, that "no pains have been spared in writing the chapter on the law of deceit;" that "the law of deceit is not so far advanced as is the law of negligence," but "we" (the author) "have done what we could to clear the subject up." "In this," the author graciously remarks, "we have had the benefit of an important case from the House of Lords."

As one passes from this much-promising preface to the body of the text, his attention is immediately arrested by the writer's fondness for unusual terms and phrases. "Polar phenomena," "equatorial belts," "positive damnific acts," and the like are frequently repeated. An actionable assault possesses "a seditious character." Damages which are recoverable for injury to feelings are "parasitic damages." We are assured that "foresight and hindsight respectively furnish the key to the question of the extent of liability in the respective fields of contract and tort;" that "the subject of negligence is bisected by the most fundamental seam known to legal theory;" that "the law of negligence is the product of an antinomy between principles belonging to different spheres." Evidently, the author does not agree with the eminent English judge who declared that, in law, nothing is so apt to mislead as a metaphor.

The author's craze for novelty is quite as noticeable in the matter of classification as in that of diction. Negligent acts are divided into